

No. 20,993

In the

United States Court of Appeals  
*for the Ninth Circuit*

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SCOTT LUMBER COMPANY, INC.,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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Appellant's Brief

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Appellant's Brief

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**STATEMENT OF PLEADINGS AND FACTS  
DISCLOSING JURISDICTION**

This is a condemnation case brought by the Government to secure title to a private existing road through private forest lands in Shasta County, California, owned in fee by the Scott Lumber Company, against Scott and others including the Southern Pa-

cific Land Company and the Watt interests. (T 1.)\* Summary Judgment was granted (T 160) with respect to all issues except the amount of compensation to be paid to Appellant, Scott. The issue of damages was tried before a jury which rendered a verdict (T 206) fixing the compensation at \$691.00. Appellant moved for a new trial (T 217) which was denied (T 237) and Final Judgment (T 212) was entered. An Appeal was duly taken from:

- (a) The Summary Judgment.
- (b) The denial of the Motion for New Trial.
- (c) The Final Judgment.

This Court has jurisdiction under Title 28 U.S.C. § 1291.

#### **STATEMENT OF THE CASE WITH RESPECT TO SUMMARY JUDGMENT**

Appellant, Scott Lumber Company, Inc., hereinafter referred to as Scott, is engaged in logging and the production of wood products. It owns some 26,000 acres of timberland and has its mill at Burney in Shasta County, California. Its mill uses some logs from its own forest property but mostly purchases selectively marked standing timber from others, principally the U.S. Forest Service. The roadway condemned by this action is an existing system of three parcels on Sec. 31 in Shasta County, which section is owned in fee by Scott and is one of a number of separate parcels in the vicinity of Burney owned by Scott. This section is an integral part of Scott's timber holdings (T 27), all of which are inextricably involved in the land management program of long term sustained yield, in compliance with the California Forest Practice Act,

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\*Throughout this Brief T will be used to designate the Transcript of Record prepared by the Clerk of the District Court and R will be used to designate the Reporter's Transcript.

to preserve this timber as a resource and assure a constant supply of timber for the years to come.

In order to visualize the property involved, Exhibit G (R 132) has been reproduced as Appendix B at the end of this Brief. This shows the entire Sec. 31 with the condemned roadway marked in green and the danger tree strips forming a part thereof shown in yellow bordering the condemned right of way on both sides.

Scott resisted the taking by a timely Motion to Stay the Action (T 18) which was treated as a Motion to Vacate the Order of Possession and combined with a formal Motion to Vacate Possession (T 77). Scott also answered the Complaint (T 50) and included an affirmative defense (T 51) that the taking was not for public use and benefit, was confiscatory and was without due process of law. Numerous affidavits were filed by Scott in support of its position (Berry, T 26; Martin, T 123; Spann, T 126; Rollow, T 131). Contrary affidavits were filed by Government employees (Mason, T 100; Stathem, T 103; Dole, T 108; Edward, T 113; Dole, T 117). In addition, the Government filed Requests for Admissions of Fact and Interrogatories. Answers were furnished promptly by Scott (T 60). The affidavits, pro and con, show the marked dispute as to the material facts relative to the nature of the taking. Before the Motion to Vacate was heard, the Government filed a Motion to Determine a Preliminary Legal Question (T 136), advising the Trial Court that there was no need under the authorities to consider the Scott Motion, since it had the absolute right to take any roads which were or might be useful in order to manage its timber resources.

A Memorandum and Order (T 153) were issued sustaining the Government's position. The Government requested (T 160) this Order to be arbitrarily converted into an Order for Summary Judgment against Scott under F.R.C.P. Rule 23(c); and

Summary Judgment was entered thereon (T 160). Scott appeals from the Summary Judgment at this time under F.R.C.P. Rule 56(d).

#### **STATEMENT OF THE CASE WITH RESPECT TO THE JURY TRIAL ON THE AMOUNT OF COMPENSATION**

After the entry of Summary Judgment the only issue permitted by the Trial Court to go to the jury was the amount of compensation due Scott for the taking. All of the other several named Defendants disclaimed any ownership or rights in the property taken and gave up any claim to the proceeds for the taking (Southern Pacific, T 188; Watt Interests, T 193e). The Government moved for a Pre-Trial Hearing (T 189) and the Pre-Trial Hearing was had pursuant to Rule 16 F.R.C.P. and the Pre-Trial Order was entered July 28, 1964 (T 194). On this Appeal Scott relies on the error, amongst others, committed by the Trial Court in *sua sponte* failing to follow the Pre-Trial Order in any material respect, to the sole and material prejudice of Scott.

The issue as to the amount of compensation was determined by a jury (T 17c). The trial began December 1, 1964 (R 12) and ended December 17, 1964 (R 1708). Just before the instructions and in commenting on the evidence, the Trial Court attacked (R 1662, *et seq*) and struck from the record all of the valuation testimony of Defendant's experts Sanders (R 1668) and Wall (R 1666), these being Scott's chief witnesses. The case was submitted to the jury solely upon the testimony of the Government experts. On the basis of this circumstance the Court considered, but sidestepped, a Motion for a Directed Verdict (R 1606; 1612-21). However, the instructions were given based upon the figment that this was the usual case where there was conflicting evidence of value. The jury received its instructions on December 17, 1964 (R 167). Shortly thereafter the

jury rendered a verdict setting compensation in the sum of \$691.00 (T 206), the exact amount testified to by Howell (R 1318). Judgment was entered thereon, January 7, 1965 (T 207). Promptly thereafter Scott filed a Motion for a New Trial (T 217) which was heard by the Trial Court, April 8, 1965. On December 28, 1965, a Memorandum Order was entered denying the Motion for a New Trial (T 237). A Notice of Appeal to this Court was filed February 15, 1966 (T 254). The matter comes to this Court alleging error in the trial and in the denial of the Motion for a New Trial.

### **SPECIFICATION OF THE ERRORS RELIED UPON**

The errors urged on this Appeal are as follows:

1. The Court erred in entering the Summary Judgment of March 31, 1961 because there was no showing whatever by the Government that there was no genuine issue as to material facts, or that the Government was entitled to judgment as a matter of law. On the contrary, the pleadings, depositions and affidavits on file show a very sharp disagreement on material facts which were in issue.
2. The Court erred in disregarding and acting contrary to the Pre-Trial Order prepared by the Government which stated unequivocally that the agreed facts "shall henceforth govern these proceedings."
3. The Court erred in accepting the valuation figures testified to by the Government witnesses, which testimony was insufficient because:
  - (a) They failed to take into consideration the Forest Practice Act of the State of California.
  - (b) They considered only the most profitable use of the land in determining value.
  - (c) They considered only one kind of informed prospective purchaser, i.e., the buyer who owned no other timber land.

(d) They did not consider the agreements and conditions of the Forest Service Special Use Permits issued by the Forest Service for use of such roadways which forbid the closing of the roadways for any purpose and therefore control of the roadway for purposes of logging was impossible.

and because of these deficiencies there was not sufficient evidence to support the verdict.

4. The Court erred in striking the testimony of Defendant's valuation experts, Sanders and Wall, and denouncing them just prior to the instructions to the jury, which was tantamount to directing the jury to disregard all of Defendant's valuation testimony to the discredit of and irreparable damage and prejudice of Defendant's case. All of this brought about an unexplained divergence between the rulings as to the exclusion of Defendant's evidence and the statements with respect thereto just prior to the instructions to the jury, and the instructions themselves, which is also error.

5. The Court erred in failing to recognize and hold that Defendant's initial objections to the Instructions to the Jury were continuing objections to each and all of them.

6. The Court erred in failing to instruct the jury with respect to critical issues which failure was bound to result in a miscarriage of justice, and more particularly in the following respects:

(a) That Sec. 31 was owned in fee by the Defendant, Scott Lumber Company, at the time of the taking.

(b) That in the determination of value, the prospective purchaser could be other than the "cut out and get out" timber buyer not interested in owning land or timber land.

(c) That the Government's valuation experts did not take into account one of two types of prospective purchasers and based their valuation figures only on depletion cutting.

(d) That the highest and best use of Sec. 31 was for the production and management of timber which could not be accomplished by depletion cutting.

(e) That the Government witnesses were not qualified to express any opinions as to the most profitable use of Sec. 31, and that figures based upon the most profitable use are valueless.

(f) That the loss of a controlled road, replaced by a Special Service Road where the public cannot be excluded is an element of damage for which Defendant should be compensated.

### **SUMMARY OF ARGUMENT**

This condemnation suit was tried in two parts. The first part involving the propriety of the Government's taking of this private property, was decided on a Motion to Determine a Preliminary Legal Issue which was converted by the Government into an Order for Summary Judgment after the Government received a favorable decision on its earlier Motion. Appellant contends that so far as this portion of the case is concerned, the taking was pursuant to an agreement between the Forest Service, the Watt private interests and the Lorenz Lumber Company to implement their private agreement to destroy competition and prefer the interests of Lorenz and Watts without any public need or purpose. Appellant contends further that the taking for such purpose is illegal and insufficient to make it a taking for a public purpose. Since the facts were in dispute, Summary Judgment was neither proper nor permissible. The granting of Summary Judgment was error.

The second portion of the suit was the trial before a jury to determine just compensation to Scott for the taking of its property. Here there had been a Pre-Trial Hearing at which certain controlling facts had been stipulated and embodied in a Pre-Trial Order prepared by the Government attorney. The

Order stated *inter alia*, that these agreed facts would "thereafter govern these proceedings".

The Trial Court did not follow the Pre-Trial Order, but *sua sponte* and without notice struck out and ignored the Stipulation, allowed the Government to impeach Appellant's experts because of the claimed existence of easement rights by Southern Pacific, struck the testimony of Appellant's experts primarily for their failure to consider such easement rights, and thereafter instructed the jury that the failure of Appellant's witnesses to cover such conflicting ownership could be used to discredit all of Appellant's position. This precluded the possibility of a fair jury determination, imparted bias to the jury, and was clear error, requiring reversal and remand for a new trial.

Assuming, arguendo, the striking out of all of Defendant's valuation testimony was proper and justified, the same rules and standards applied to Appellant's valuation experts were not applied to the Government's valuation experts and had the same standards been applied their testimony would have been stricken because of their ignorance of and failure to consider essential facts.

Thus the Government witnesses were allowed to ignore the *Forest Practice Act of the State of California* which made the basis of their valuation, "clear cutting", illegal and contrary to public policy if done by a private citizen. The Government experts instead, were allowed to adopt the theory and base their valuations upon the most profitable use of the land which is concerned with economics and accounting in which areas neither witness was qualified to express any opinion or conclusion; they considered only one kind of prospective purchaser in making their valuation, namely one not subject to California law and who owned no other timber land, to the complete exclusion of another admittedly different kind of purchaser, one who did own other timber land and was subject to California

law; the Government witnesses were allowed to ignore the printed standard conditions of the Forest Service Special Use Permits, which were contrary to the facts to which they testified and upon which they based their valuation opinions. Accordingly, because of these deficiencies and the insufficiency of a sound basis for the expression of opinions, their conclusions were also valueless, and therefore, there is not sufficient evidence to support the verdict of the jury.

Furthermore, the Court erred in timing the striking of the valuation testimony of Appellant's experts to come just before the instructions which inflamed and prejudiced the jury against Appellant and had the effect of discrediting all of Defendant's testimony. This brought about an unexplained divergence in the rulings which the jury was unable handle, i.e., the striking of the valuation testimony as separated from any other testimony by Defendant's witnesses, leaving the jury with the impression that only the Government witnesses were to be believed. Finally, the Court erred by failing to instruct the jury with respect to critical issues, the failure of which was bound to result in a miscarriage of justice, which is just what occurred. There is no pretense that these instructions were requested by Appellant or were denied over objection. They were, however, necessary to a proper trial and the Court should have given these in the proper control of the litigation. While these may not be specific issues on an appeal, nevertheless, they were proper for consideration on a Motion for New Trial and the failure of the Court to recognize this failure and grant a new trial is error which requires reversal and remanding for a new trial. The determination of just compensation to Scott was impossible.

Upon all of the circumstances it abundantly appears that the evidence cannot support the verdict of \$691.00 as fair compensation for the land, and that the determination of fair compensation to Appellant was denied through the errors which

are here asserted on Appeal. It should be noted that in matters of condemnation, a private citizen is faced with a proceeding brought by a Federal agency, with Federal attorneys and before a Federal tribunal. The Federal Courts under those circumstances have a heavy responsibility to make certain that just compensation is determined only after a fair and impartial trial. That was not done here. For this reason alone the suit should be remanded for a new trial.

### **ARGUMENT**

The right of a private party to own and hold property even against the Government is protected by a Constitutional prohibition against its taking except for public use, and only then for just compensation (United States Constitution, Fifth Amendment). The Government did not take the entire Sec. 31 owned by Appellant, Scott Lumber Company, Inc., but only the portion thereof comprising the road system of three parcels and the timber bordering the existing roadway (R 1231). The taking occurred May 18, 1960.

### **THE COURT ERRED IN ENTERING SUMMARY JUDGMENT**

Rule 56(c) F.R.C.P. provides that Summary Judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions on file and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Throughout the course of several motions in the early stages of this litigation there was never any attempt by the Government to show through the pleadings, the Answers to the Interrogatories, depositions or the Affidavits that there was no genuine issue as to the material facts or that the Government was entitled to judgment as a matter of law. The issue raised by all of the pleadings and supporting documents,

was whether the taking was for a public purpose; Scott's proof being that it was primarily a scheme to favor one lumber mill, the Lorenz Lumber Co., as against Scott in particular, as well as any other operator within the area, and that the Congressional authority for condemnation does not exist for this purpose.

There is no dispute that the road system consisting of three parcels shown in green on Exhibit G reproduced as Appendix B at the end of this Brief, was an existing fire trail system which had been made by Scott into a prudent operator's logging road (R 78, 1153) suitable for the cutting and removal of timber on Sec. 31 and for the transport of timber thereover by operators in the surrounding areas (R 20-21; 59). A much larger area is affected by the taking as this includes the yellow portion as well as the green portion which is the road itself. This prudent operator's logging road varied from twelve to eighteen feet in width and was a dirt road which was carefully built and maintained, watered during the dry season, graded constantly and drained by the installation of culverts. It is carefully prepared for the winter season to prevent erosion and disruption of the road surface. It is kept this way in order to maintain the heavy traffic of logging trucks and other necessary equipment with the maximum smoothness and facility and a minimum of delays.

By referring to the plat which is the area which is also reproduced as Appendix C at the end of this Brief, it will be observed that Sec. 31 is reproduced in blue and that within the designated lines the area colored green are those belonging to the Forest Service and those in red by the Watt Interests. The only other privately owned timber land is reproduced by yellow and a dark green. This was the area to be controlled by the agreement between the Forest Service, Watt, and Lorenz, and the road was needed through Sec. 31 to carry out the terms of this private agreement (T 32, 34). The Government, of course, has no sawmill. The Watt Interests have large holdings of timber land in this area (T

27) but no sawmill. The Watt Interests were, therefore, instrumental in bringing Lorenz into the area, and Lorenz established a sawmill, but has no timber land in this area (T 31, 33). Thus, Scott and Lorenz are direct competitors for the timber products of this area (R 23, 1197). In conveying Sec. 31 to Scott, the Watt Interests reserved a right to pass over the road system on Sec. 31 in order to move their products to the Lorenz mill (T 33). The Watt timber in Sec. 19 to the north was cut by Lorenz in 1958 in the area known as Snow Cabin (T 31).

Prior to the condemnation in this case Watt and Lorenz tried to buy the Scott mill (T 33). Failing in this, the Government in conjunction with Lorenz initiated negotiations with Scott for the use of the road system through Sec. 31 (T 33). Scott offered to let anyone purchasing Government timber haul the logs over this road system without the payment of any fee and with only the usual maintenance provisions (T 31, 38). However, the negotiations bogged down because of the Government's insistence that it own these roads (T 36). Since the ownership in other hands could affect management of all of Scott's lands and because of the danger of competitive prejudice, Scott refused to part with title. Condemnation was filed prior to the close of negotiations (T 38).

For what purpose then did the Government condemn these three parcels? Certainly not to build logging roads to remove Government timber because prudent operator's logging roads were already there (T 27) and available without charge except customary maintenance. Certainly not for administrative purposes for the Government had the right to pass over these roads at all times, particularly for fire control and suppression purposes (R 69). Accordingly, condemnation was not necessary either to build a road or to move Government timber over the road. Condemnation was not necessary for recreational purposes because Sec. 31, since the surrounding sections involve difficult steep terrain, was not particularly adaptable for recreational purposes (R 1145, 1146).

The only remaining purpose discernible from the record is that the Government wished to increase the width of the roadway (T 22) from the then width of twelve to eighteen feet to its present width of twenty-eight to thirty feet to favor the larger, unusual and publicly illegal equipment utilized by Lorenz. A thirty foot width road is not needed for logging because most logging vehicles and particularly those employed by Scott over the years, conform to the State of California truck and trailer load widths of a maximum eight feet. The existing road system was adequate for these needs (R 99).

It was apparent that Scott had nothing to gain by joining in or implementing this agreement because (T 34-35):

- (a) The purpose of the agreement was to confer private benefit to Lorenz and to the financial detriment of Scott.
- (b) It would destroy the usefulness of Sec. 31 in Scott's over-all plan of timber management.

Although no written agreement was ever signed between the Forest Service, Watt and Lorenz, the substance became the agreement (T 68) and was put into operation without Scott through the means of this condemnation.

While the condemnation here appears at first blush to be in the public interest, a reading of the testimony and the affidavits of both parties contains convincing evidence to the contrary. Scott is in the hapless and hopeless position of having its land expropriated by the Government for discriminatory private benefit of its competitors, while destroying a part of its own property. Scott has no remedy except to appeal to this Court.

The clear preference to Lorenz is pointed up by the fact that Lorenz does not use standard size logging trucks, but uses the so-called "off-highway vehicle", which has an over-size width, height and weight and is illegal for use on public highways.

The width averages from eleven to twelve feet and are prohibited and illegal on State highways. It is a matter of simple arithmetic to show that standard width logging trailer loads eight feet wide such as Scott and almost every other logger uses, can pass comfortably on an eighteen foot road area while "off-highway" vehicles cannot do this. Both the Government and Scott were well aware that Scott could not be forced to widen the existing roadway. Thus the present plan was adopted. The problem was solved and a competitive advantage given Lorenz in the sale of Government timber by this condemnation. In competitive bidding and sale of Government timber the cost of hauling is an important factor (R 1163). If Lorenz had to pay the upkeep on longer roads, and could not pass over Sec. 31, it would have to include its higher truck cost. If, however, it could use its illegal "off-highway" equipment on special Government roads it could haul more logs at a lesser cost than its competitors, and the base cost would not be paid by it—but rather by the Taxpayers—including Scott. It is clear that Scott, by using vehicles complying with the State highway laws, was penalized.

The above facts, of course, are disputed in many instances by the Government. Scott does not urge here that its position would be sustained upon a trial, but only urges that these facts should have gone to the jury for determination as to whether the taking was for a private purpose.

#### **THE COURT ERRED IN DISREGARDING AND ACTING CONTRARY TO THE PRE-TRIAL ORDER**

The Pre-Trial Order (T 194-196) was prepared by the Government after the Pre-Trial Hearing. It was entered pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule ND-3, and stipulated that it "shall henceforth govern these proceedings" (T 194).

With respect to the status of the ownership by Scott of the entire Sec. 31 and the encumbrances upon it, said Order provided in paragraph (2) (T 195):

"(2) That at the time of taking the land involved was owned in fee simple by Defendant Scott Lumber Company, Inc. subject, however, to certain easements and rights of way vested in Defendants, R. G. Watt and Alice McCourt Lamm, individually, and as Trustee of Trust "B" of the estate of W. E. Lamm, deceased."

There is no dispute that the Pre-Trial Order was agreed upon as controlling the trial and that Scott relied thereon. The Trial Court, however, ignored the Pre-Trial Order and permitted testimony with respect to the claimed ownership of an additional easement by the Southern Pacific Land Company. This testimony was utilized for two purposes, *first* to show depreciated value of Scott's property, and *second* to discredit Scott's experts who did not refer to this aspect of the case in their testimony. The Government's valuation experts testified that they examined the records and found that the property was subject to easements of both the Watt Interests and the Southern Pacific (Howell, R 1304; Linville, R 1405) and both had used these items as encumbrances (Howell, R 1304, 1349; Linville, R 1406) substantially limiting the value of the property both before and after the taking. Counsel for the Government made no request at any time to be relieved of the stipulation and Order.

Rule 16 does not require that the stipulations in a Pre-Trial Order controlling the course of the litigation shall freeze the trial into a solid state regardless of subsequent developments. The Rule specifically provides that the Order may be modified at the trial upon request to prevent manifest injustice. It does not, however, contemplate *ex parte* departures, particularly if made by the Trial Court *sua sponte*, after one party has put in his entire case in reliance upon the Order.

To the contrary, the Courts of this Circuit in reliance upon Rule 16 of the Federal Rules of Civil Procedure and Local Rule ND-3, underscore the necessity of compliance with the Pre-Trial Order and the agreed facts, except where relief is necessary, after notice, to prevent manifest injustice.

In *Walker v. West Coast Fast Freight, Inc.*, 233 F.2d 939 (9th Cir., 1956), Chief Judge Denman noted: (p. 941)

"Appellant contends that the District Court erred in refusing to allow her to show pain and suffering in child birth and the necessity of shortening the gestation period to seven and one half months caused by her injuries. The District Court stopped her attorney in the midst of discussing this item of damage in his opening statement and refused to allow the presentation of evidence on the point because appellant had failed to disclose such a contention at the pre-trial conference. Appellant urges that the pre-trial order when construed with information known by appellees covers such an element of damage."

\* \* \* \* \*

"Federal Rules Civ. Proc., rule 16, 28 U.S.C.A. provides that a pre-trial order 'controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.' One major purpose of such an order is to eliminate surprise by sharpening and simplifying the issues which must be tried. The District of Oregon has strictly required the disclosure of 'all legal and fact issues' at the pre-trial conference since 'surprise, both as a weapon of attack and defense, is not to be tolerated under the \* \* \* Federal procedure' and the 'rules outlaw the sporting theory of justice from Federal courts.'

\* \* \* \* \*

"Assuming appellant had no intention of catching appellees off guard at trial, she easily could have moved for an amendment to the pre-trial order to specifically include such a claim for damages. Even after appellant's counsel was stopped by the trial judge while he was discussing this issue with the jury, no such motion was made.

"The District Court did not err in this respect."

In *Ringling Bros.-Barnum & Bailey C. Shows v. Olvera*, 119 F.2d 584 (9th Cir., 1941), Olvera contracted with Ringling Bros. as an independent contractor, to perform as a trapeze artist. Language in the contract released the circus from ordinary negligence under Florida law, and likewise in Texas where there is no public policy against contracts which exempt one from liability for ordinary negligence. The refusal of requested instructions predicated liability of the circus solely on gross negligence was reversible error. The Court held: (p. 584)

"The injuries to Olvera occurred in a performance while the circus was traveling through Kansas. At the pretrial conference it was stipulated that Florida was the place of making of the contract and the stipulation made a part of the pretrial order. This pretrial stipulation is binding unless modified at the trial (Federal Rules of Civil Procedure, rule 16, 28 U.S.C.A. following section 723c). At the trial there was evidence from which it could be inferred that the contract was executed in Texas, but the order was not modified and we hold the stipulation is binding."

In *First Federal Savings & Loan Ass'n. of Bremerton v. United States*, 295 F.2d 481 (9th Cir., 1961) the District Court granted the Government specific performance of a contract to lease, which appellant considered inequitable because the rent did not represent reasonable value. The Court held: (p. 482)

"In this case certain witnesses testified giving their opinions as to the reasonable rental value of the premises here involved and the sums stated by them were substantially in excess of the rental agreed in the contract for lease referred to in the trial court's opinion. The trial court made no findings as to the reasonable rental value and gave no consideration to the question of whether the agreed rental was or was not inadequate.

\* \* \* \* \*

"However, the case was tried after a pre-trial conference and on entry of an order defining the issues to be tried and

setting forth the contentions of the parties with respect to the facts and the law. The question of the adequacy of the consideration and the fairness of the contract was not listed as an issue in the pre-trial order which undertook to set forth all of the issues of fact and of law to be tried and determined by the Court.

\* \* \* \* \*

"For the reason we have suggested, the trial court was not obliged to take any action in respect to this argument of the appellant since the issues before the court had been completely defined and formulated in the pre-trial order mentioned. As noted in Rule 16 F.R.Civ.P., 28 U.S.C.A., the purpose of such a pretrial order is 'the simplification of the issues'."

The Order here was made with the clear assent of both parties. There was no reservation of the point now raised by the Government and supported by the Trial Court. No application was made by Government counsel during the trial to be relieved from this Pre-Trial Order, and the Court did not take any action to do so, or to protect Appellant from any release from the Order during the trial.

It is possible that the Trial Court may have believed it could ignore the Pre-Trial Order and that its attack upon Scott was to further justice. However, the authorities uniformly hold that if a party is to be released from his agreement at pre-trial because of a *subsequent* change of circumstances, then the Court must impose protective terms to prevent harm to the opposing party, and the failure to do so is reversible error.

*Moore's Federal Practice*, 1964 Supplement to Vol. 3, pp. 74, 75:

"In relieving counsel of pretrial stipulations to prevent injustice, the court must impose protective terms to prevent harm to opposing party and failure to do so was reversible error." [Citing *Laird v. Air Carrier*, 263 F.2d 948 (5th Cir., 1959)].

*Seminar on Procedures*, "The Pre-Trial Order" by Hon. A. Sherman Christenson of the U.S. District Court, Utah, 29 FRD 191, at 378:

"While the trial court has the right to relieve counsel of pre-trial stipulations to prevent manifest injustice, it should impose suitable protective terms or conditions to prevent substantial harm to the opposing party. The court errs in relieving a party of a stipulation as to a crucial fact without imposing appropriate conditions to protect the opposing party." [Citing *Laird v. Air Carrier Engine Service, Inc.*, 263 F.2d 948 (5th Cir., 1959)].

There was nothing at the trial which required the alteration of the Pre-Trial Order, and it is very clear that the Trial Court failed to impose any measures to protect Scott; on the contrary, its final act in striking the testimony of the Scott experts at the close of the entire case, came after it was too late for Scott to amend its proofs. This is reversible error.

Why did Scott's attorney not call the provisions of the Pre-Trial Order to the Court's attention? This is easily answered. He was a young, inexperienced attorney who had not participated in the Pre-Trial Order (R 39). Furthermore, there was no way of knowing that the Trial Court would rely upon the alleged ownership by Southern Pacific to destroy Scott's case. At the time counsel became aware of the situation, the testimony had been closed and the statements made to the jury before he was permitted to object (R 1669). One of the major benefits of the Federal Rules of Civil Procedure, including pre-trial, is to do away with trickery and entrapment and to make sure that the judgment is based upon merit, not on the adversary's adroitness.

Witnesses on behalf of Scott, Messrs. Berry and Toler, testified that at the time of the purchase in 1951 the Southern Pacific easement had been cleared away by the title company, so that there were no other deeded rights of way except those of the Watt Interests stated in the deed (R 83; R 252). Further there was no

adjacent land owned by Southern Pacific Land Co. which would have rendered the right of way valuable and of substance (R 1283). Thus Scott's witnesses by failing to testify as to the Southern Pacific so-called easement were merely affirming what was believed to be true, and that which was stipulated as true by the Pre-Trial Order.

The gravity of the departure from the Pre-Trial Order did not appear until near the end of the trial, just before the instructions were given. At that time the Trial Court, in commenting on the evidence, stressed: (R 1662)

"During the trial I have indicated to you on more than one occasion that the opinion of a so-called expert witness is only as good as the reasons that back it up. That is, the reasons and the knowledge upon which it is based.

\* \* \* \* \*

"For an expert to base his opinion on facts as the expert chooses to interpret the facts is one thing. But for an expert to base his opinion on erroneous facts is something else."

The Court then added that if an expert assumed erroneous facts which were basic to the opinion such that it would be substantially changed if he had known or considered the true facts, then the whole opinion became worthless.

Following this observation the Trial Court then directed the jury's attention to the testimony of Scott's valuation expert Wall, treating it as a horrible example of careless testimony and striking it because, *inter alia*, Wall had arrived at his opinion as to value without considering the Southern Pacific Land Company easement, which apparently did not exist. Thus the Court stated: (R 1663-4)

"Now, we have such a problem in this case in the valuation opinion of Mr. Wall, one of the valuation witnesses for Scott Lumber Company. Mr. Wall admitted in reaching his opinion as to the before and after value of the property in question he did not know that the Southern Pacific Company

and its assigns and successors had a right to cross the property or transport timber across Section 31. Yet the record contains uncontradicted evidence that the Southern Pacific did have such a right. Additionally, he assumed that as of May 18, 1960, the United States Government had no right to utilize the road system on the property whereas the evidence has been established without contradiction that these roads could be used by the Forest and other officers of the United States on official business."

The Trial Court's very words contain the repudiation of the terms of the Pre-Trial Order and its striking of Wall's testimony merely completed the error. At this point Scott's case was hopelessly prejudiced and the gravity of the error is plainly apparent.

The Trial Court's comments on the right of the Government to pass over Sec. 31 ignored the Government's stipulation that it had no deeded right to do so (R 255). However, it is true that all land within the Shasta-Trinity National Forest wherein the Forest Service is responsible for fire protection, by custom and by law the Government is given the right to pass over the land for administrative or fire purposes. The Government has always had this right (Berry, R 69; Toler, R 238). However, the Trial Court's language made it appear that the Government already owned an easement or had other title.

The Trial Court's prejudice as to Wall because of what it believed to be his ignorance of the valuable ownership of the Southern Pacific Land Co., was further exemplified when it told counsel, after both parties had rested but out of the presence of the jury: (R 1597)

"Now going from there to his [Wall's] lack of knowledge of the right of Southern Pacific to use a right of way across the property, I don't know how I could possibly instruct this jury to devalue Mr. Wall's opinion after I had told them he had made an erroneous assumption with reference to Southern Pacific's right to cross the property.

\* \* \* \* \*

"He is in error in this respect because there is no evidence in the record to the contrary. All we have is the evidence that Southern Pacific did have a right of way across the property and we have no evidence to the contrary."

The stipulation by the parties in the Pre-Trial Order had, of course, accounted for the "lack of evidence to the contrary."

Nor was the reference to the Southern Pacific an isolated instance where the Trial Court permitted the Government to ignore the Pre-Trial Order, without equivalent protection to Scott.

In another instance, concerning a possible reversion, the Court instructed the jury that the estates and interests condemned by the Government were: (R 1678)

"in case of permanent abandonment of the right of way by Plaintiff, the title and interest therein taken shall end, cease and terminate, and title shall revert to the then owners of the underlying interests in said right of way."

This instruction is contrary to the Pre-Trial Order wherein it was stipulated in paragraph (3): (T 195)

"Defendants, R. G. Watt and Alice McCourt Lamm, individually, and as Trustee of Trust "B" of the Estate of W. E. Lamm, deceased, have previously appeared in this proceeding and *have disclaimed any further interest in the estate condemned* and in the amount to be awarded for the taking herein." (Emphasis supplied)

Thus, the jury was instructed on facts contrary to the Pre-Trial Order.

And, in the opinion denying the Motion for a New Trial the Trial Court *sua sponte* again impeached the Pre-Trial Order by referring to a letter (T 248) from the attorney for the Watt and Lamm interests, not in evidence and not in the record, in which it was requested that the Pre-Trial Order should state that in the event the Government abandoned the easement the interests were

to revert back to the parties. This is not what the Pre-Trial Order states. Paragraph (3) of the Pre-Trial Order states, (T 195) that they:

"\* \* have previously appeared in this proceeding and have disclaimed any further interest in the estate condemned \* \*"

This is what Scott relied upon in its case. Thus, even after being specifically advised of the Pre-Trial Order, the Trial Court still insisted upon ignoring it to the sole injury of Scott. After many meetings Scott and the Government had entered into the stipulations. In return for the stipulation as to ownership, Appellant stipulated as to the value of the timber taken. When the Trial Court ignored one stipulation, it should have also released Scott from its stipulation as to value of the timber, and granted the new trial.

#### **THE TRIAL COURT ERRED IN ACCEPTING THE VALUATION FIGURES OF THE GOVERNMENT WITNESSES BASED UPON ERRONEOUS ASSUMPTIONS**

As has already been pointed out, every effort was made to impress the jury that the opinions of an expert witness must be soundly based, and that Scott's witnesses did not fulfill this standard (R 1666).

Thus the Trial Court instructed the jury: (R 1675)

"A witness wilfully faults in one material part of his testimony is to be distrusted in others. The Jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point."

And again: (R 1686)

"However, you are instructed that certain witnesses may not base their valuations upon unwarranted theories of law or assumptions of fact, nor upon matters of a speculative or conjectural nature; nor may be [*sic* the] opinions of expert

witnesses be based upon a sequence of conjectures. To the extent that the opinion of any of the expert witnesses is based upon such matters, his testimony is of little value and should be disregarded."

With the castigation and elimination of the valuation opinions of Appellant's experts, Wall and Sanders, and with no comment by the Court upon the valuation opinions of the Government witnesses, these instructions can only exaggerate the situation and mislead the jury into believing that the Government witnesses were above any fault. The same standards were not applied to the Government witnesses. If they had been then the Government valuation opinions would also have been stricken.

**Government Valuation Experts Formed Their Conclusions Without Consideration of the Forest Practice Act of the State of California**

It is believed to be uncontroverted and incontrovertible that the most dominant consideration of forest lands is the preservation of the timber as a natural resource. This is inseparably tied to the principle of conservation (R 1128). The Forest Service in charge of Federally owned timber property has an established policy for and practices long term timber management. By this is meant that the timber is treated as a product to be harvested so that there is a continuous yield without depletion or exhaustion of the timber as a resource (Howell, R 1373; Stathem, R 1128, 1137, 1191). The Government is dependent upon selling its timber to privately owned mills in the maintenance of this practice, but under no circumstance will the Government sell timber except on the basis of sustained yield timber management to insure that there will always be a timber resource for the American people (R 1139). Private timber owners also, have assiduously followed the practice of timber management and without it private forest industry could not exist. Scott has practiced timber management for years and Sec. 31 is, of course

inextricably a part of the timber management program (R 18, 140). It seems axiomatic that there can be no conservation of the timber resource, whether publicly or privately owned, without long term timber management. Southern Pacific Land Company operates its timber property on a management basis to conserve the timber as an asset (R 1289) and so does the P.G. and E. (R 1281). Again, Mr. Stathem testified that after careful analysis the Forest Service: (R 1154)

"\* \* had determined the best and highest use of this area was for the harvesting of the timber, managing the timber crop."

It is abundantly clear from the testimony that both Government valuation experts Howell and Linville based their valuation opinions not upon timber management and conservation but contrarily upon the immediate harvest of all of the timber on Sec. 31, all 898 acres (Howell, R 1336, 1314; Linville, R 1437, 1409, 1466). Both of these witnesses testified as to what they meant by clear cutting or immediate harvest. Linville testified that clear cutting meant that they would cut all of the trees with no "attempt to save any of the trees that you are not forced to leave" (R 1466-7). They based their valuations on clear cutting the section on a "cut out and get out" basis, leaving only stumps (R 1455). They also used, in arriving at their valuations, not forest land but stump-land or cut over land, (Howell, R 1259, 1261, 1294, 1299, 1307-10; Linville, R 1420, 1453). Such clear cutting operation Linville testified would take no more than from one to two years (R 1464). Howell said within a year (R 1394). When this was finished the land would have a value only as stumpland and Linville testified that there was a good market for stumpland (R 1422, 1454). This had a different market than timber land (R 1422, 1454). There can be no question but that the Government testimony is conclusive that the valuation opinions were based upon the clear cutting of Sec. 31. In denying the Motion

for a New Trial the Trial Court held in effect that private timber owners could cut as they pleased regardless of the illegality, immorality and stupidity of the clear cutting (T 249-250).

There can be no doubt that the conclusions of the Government valuation experts necessarily involve a failure to consider the laws of the State of California, because clear cutting is illegal and against public policy. There is no question but that Sec. 31 is privately owned timber land within the jurisdiction of the State of California and that the cutting of privately owned timber land is governed and controlled by the Statutes of the State of California. The *Public Resources Code* of the State of California defines the purposes in Section 4901\* as follows: (pp. 369-370)

#### "GENERAL PROVISIONS AND DEFINITIONS.

"§ 4901. This chapter may be known as the Forest Practice Act. The purpose of this chapter is to declare the existence of a public interest in the forest resources and timber land of this State; *to declare the necessity of good forest practices* in the harvesting of forest resources *to conserve and maintain the productivity of the timberlands in the interests of the economic welfare of the State* and the continuance of the forest industry; to establish forest districts in which standards of forest practice shall be adopted to promote the maximum sustained productivity of the forests; to authorize the creation of district forest practice committees which shall formulate and adopt forest practice rules, and approve forest management and alternate plans for final approval of the State Board of Forestry; to specify the manner in which forest practice rules and plans shall be administered; and to provide for the functioning of the district forest practice committees in an advisory capacity to the State Board of Forestry.

*"The public interest is affected by the management of forests, timberlands, watersheds and soil resources of the State, and it is the policy of this State to encourage, promote*

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\*Effective September 11, 1957 and in effect at the time of the taking.

*and require such development, use, and management of forests and timberlands as will maintain the continuous production of forest products, to the end that adequate supplies of forest products are assured for the needs of the people and industries. It is the policy of this State to encourage and assist private ownership in the management and economic development of privately owned timberlands."* (Emphasis supplied)

Thus, it is against the public policy as established by this Code to cut timber land on any basis other than management of the timber lands, so as to maintain the continuous production of forest products to meet the needs of the people and industries.

There is no question but that Sec. 31 falls squarely within the definition of timber land provided in Section 4904 of the Code. There is also no question but that the prospective purchaser for Sec. 31 whether he be a timber owner as defined by Section 4907, or a timber owner-operator as defined by Section 4908, or a timber operator as defined by Section 4910 of the Code, all are equally bound by the single definition of the "Timber operations" in Section 4911 of the Code. In other words, the Forest Practice Act applied in 1960 not only to mill operators, but to any private purchaser, whether he desires to clear cut or not.

By Section 4936 of the Code, a committee was established for the determination of forest practice rules which have the binding effect of law when approved by the State Board of Forestry.

All logging or timber operations in the State of California on privately owned land in 1960, at the time of the taking, was subject to a valid permit from the State Forester, a condition of which was the unconditioned warranty to abide by the minimum cutting rules established pursuant to the Code. Thus, before any prospective purchaser could cut any privately owned timber land, whether he was another timber land owner or a gypso, he was required to subscribe to the principles of forest management and the preservation of the timber resource, and to cut accordingly.

Amongst the rules promulgated pursuant to the Forest Practice Act published in February, 1960, by the State of California Department of Natural Resources, Division of Forestry, which form a part of the California Administrative Code, and the particular rules referring to the North Sierra Pine Forest District (II) in which Sec. 31 is located, a statement of purposes is clear:

"921. Statement of Purposes. The purpose of these rules is *to establish minimum standards of forest practice for promoting maximum sustained productivity of the forests of the North Sierra Pine Forest District in the interests of the economic welfare of the State of California and the continuance of the forest industry, as contemplated by the Forest Practice Act (Section 4901 et seq., Public Resources Code).*" (Emphasis supplied)

The minimum cutting practices are provided in Article 3 and are as follows:

"923. Cutting Practices. Every operator shall take precautions and necessary actions in all harvesting operations on timberlands *to insure continuous production of forest products.* To comply with these provisions, he shall regulate his cutting operations for different conditions and circumstances as follows:

"923.1. Minimum Diameter. Every timber operator shall conduct his timber operations so as to leave uncut all thrifty, immature ponderosa pine, sugar pine, Jeffrey pine, incense cedar, white fir, Douglas fir, red fir and white pine trees *that are not at least 20.0 inches D.B.H., except as provided in Section 923.2 of these rules.*" (Emphasis supplied)

The Public Resources Code of the State of California and the Forest Practice rules promulgated pursuant thereto must be accepted as authority to show that there are not two standards, one for the cutting of public timber lands and a different one for private timber land, that the Forest Practice Act of 1957 (Pub. Res. Code § 4901) made certain that they were in conformity.

There is no evidence that the Government valuation experts ever considered the laws of the State of California regarding the cutting of timber on privately owned property. To the contrary, if they had it would have been perfectly apparent that clear cutting not only would be against public policy as stated by the Code, but a punishable offense. It is clear, therefore, that the Government experts gave opinions as to value based upon a practice which is contrary to the stated public policy and contrary to law as set forth by the California Forest Practice Act. Thus, under the *Olson* case,\* such a use could not be legally considered since the land was not "adaptable" to the use upon which the value was predicated.

No clearer manifestation of the disregard for the actual law or actual facts can be found than the complete disregard of the State law. In sum, Scott finds itself damaged because it adhered to the law of its sovereign—the State of California. While the Forest Service and the Federal Government often are free to ignore State law—private citizens are not.

#### **The Government Experts Considered Only the Most Profitable Use of the Land in Determining Value**

In the absence of any comparable sales, as is the case here (Howell, R 1293; Linville, R 1410-11), market value is sometimes determined on the basis of the highest and best use to which the land in question may be put. Here, the jury was so instructed (R 1680). Mr. Stathem, the U.S. Forest Service Supervisor for the Shasta-Trinity National Forest (R 1124) in which Sec. 31 is located (R 1134) testified that the Forest Service made a careful review of all of the land within the forest under his charge to determine the highest and best use,—what it is best suited for (R 1136), and determined that the highest and best

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\*See p. 32 *infra*.

use was for the production of timber (R 1137, 1154). This included harvesting and managing of timber on a controlled management basis (R 1145, 1154) which would assure a permanent supply of timber. This was precisely what Scott was practicing with respect to Sec. 31 prior to the taking (R 20, 27, 29) and Stathem agreed (R 1191).

When asked to split the highest and best use, considered from a forester's point of view from other points of view, Stathem was confused and so stated (R 1191). From a forester's point of view there was no doubt that the highest and best use of Sec. 31 was for sustained yield timber management and control. The road system here was an integral part of that use (R 28, 21). Otherwise the entire value of Sec. 31 could be locked in.

Then began a metamorphosis under the questioning of the Government attorney. He persuaded Mr. Stathem to alter his testimony such that highest and best use from an *economic* point of view was the most profitable use and became something different from highest and best use from a forester's point of view. (R. 1193) It seems evident that highest and best use is the one arrived at taking into consideration all uses, not the fiction of an "economic" or profit use.

The Government valuation witnesses bluntly stated that the valuations given by them were based upon a use with the most profit. Howell definitely stated and repeated on several occasions that both his before valuation (R 1298-99) and his after valuation (R 1314, 1337, 1356) were based solely upon the highest and most profitable use. Linville's testimony was to the same effect (R 1437). This, in turn, was predicated upon devoting this land to one particular use, clear cutting, as will be shown later herein. By any definition or understanding, profitable use is an economic term, and whether a particular use is profitable or not,

is an accounting matter dependent upon a particular operation taking place, which together with the business considerations, may be compared with the result to determine whether or not a profit can or cannot be made. Neither Howell nor Linville were either economists or accountants. Neither did they qualify as experts in economics or accounting (Howell, R 1244; Linville, R 1398). Furthermore, they did not have any factual basis upon which to testify as to the overall profit or profitable use by anyone in this industry. Instead they thought only in terms of a quick dollar. Accordingly, their valuation opinions are based upon matters upon which they were not entitled to give any opinion. It seems appropriate to apply the Government attorney's observation: (R 1014)

"Anyone can come to a conclusion, but unless he has a sound foundation for that conclusion, the conclusion is worthless."

The Trial Court adopted the Government's position solely and instructed the jury (R 1680) that market value was to be determined upon the highest and most profitable use. A timely objection was made to this (R 1606) to no avail. The Court made no comment with respect to the Government's testimony in this connection or in any connection for that matter, and this together with the instruction could only result in reversible error. In accordance with the Trial Court's own instructions to the jury that experts may give opinions only in the areas where they are qualified by training and experience, the Government valuations are erroneous and valueless.

It should not take any feat of logic to show that market value cannot be determined solely by the most profitable use, which was the only consideration of the Government valuation experts. Indeed, even if it be accepted that the most profitable use is

clear cutting, as urged by the Government, then this use ignores the State law, for it is illegal under the California Forest Practice Act. A profitable use is also determined by the skill or the lack of it in the person who conducts the use. The use might be profitable under one circumstance and unprofitable under another. Profitable use depends upon the market value of logs and lumber which have been subject to great upward and downward swings, particularly in the critical years. Thus, the most profitable short term use is not a sound basis for determining market value.

The Government sought to justify equating highest and best use in determination of market value with highest and most profitable use under the authority of *Olson v. United States*, 292 U.S. 246, 255, 256; 78 L.Ed. 1236, 1244, 1245; 54 S.Ct. 704 (1933). In that case the Federal Government took easements of flowage upon lands bordering Lake of the Woods (partially located in Minnesota). The easement was to raise the lake water level to a certain contour for water storage purposes. The three petitioners separately owned, in Minnesota, a total of 1326 acres of shoreland below this contour, which acreage would be flooded. The raising of the lake level to the specified contour would also offset 2215 miles of shoreline located in Canada, numerous islands, land in Minnesota, and would affect 850 parcels of land owned by 775 persons, or a total of 1225 persons including mortgagees, etc. It would also affect the Canadian Government owning all the Canadian shorelands.

The award to the petitioners was based on their land as being agricultural, and excluded any consideration of their land's adaptability as water storage uses. Furthermore, the trial judge refused to admit any evidence proffered on behalf of petitioners in which they were seeking to prove adaptability of their shoreland for water storage uses. The Circuit Court affirmed the judgment of the District Court.

In affirming the judgment of the lower court, the U.S. Supreme Court held that the trial court did not err in refusing petitioners' offered evidence as such use of petitioners' land is not within the realm of reasonable probability and should be excluded from consideration.

The Supreme Court also stated: (p. 255, 78 L.Ed. at p. 1244)

"Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. *The highest and most profitable use* for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, *not necessarily as the measure of value*, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held." (Emphasis supplied)

To bring the holding of the *Olson* case into the Ninth Circuit, they cited *United States v. 711.57 Acres of Land in Eden TP, Alameda County, Cal.*, 51 F.Supp. 30 (DC, ND, Cal. 1943) which was an opinion by Judge Goodman.

Parcels of land, agricultural and in some cases improved by buildings and other farm appurtenances, were included in the land, subject of this condemnation case in connection with Russell City Airfield. The Court said at pages 31 and 32:

"[1] The issue that I am called upon to determine here is the 'market value fairly determined as of the date of taking.' *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. ....; *Olson v. United States*, 292 U.S. 246, 54 S.Ct. 704, 78 L. Ed. 1236.

"As frequently stated, market value is 'what a willing buyer would pay in cash to a willing seller.' *United States v. Miller, supra*, [317 U.S. 369, 63 S.Ct. 280, 87 L.Ed. ....].

"[2] It is settled that 'where actual sales cannot be used as a basis for ascertaining "market value" \* \* \* appraisals are made and the jury decides from the various appraisals and other evidence, what the "market value" is.' *Washington Water Power Co. v. United States*, 9 Cir., 135 F.2d 541, 542, decided April 30, 1943.

"[3] It is also settled that a witness may base his appraisal on the 'highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future.' " *Olson v. United States, supra*, [292 U.S. 246, 54 S.Ct. 708, 78 L.Ed. 1236].

Thus, under the authorities, the "most profitable use" must be supported by its adaptability or immediate need. There is no such testimony in this case. Indeed State Law prohibits such adaptability.

The shortsighted most profitable use is not the test. It is stated in Vol. 4, Nichols, *Eminent Domain*, p. 140:

"The ultimate test of value is the use to which men of prudence, wisdom and means would devote the property if owned by them."

The wise use of timberland is conservation (Stathem, R 1128). That is the highest and best use of Sec. 31. According to the Government experts, the highest and most profitable use of Muir Woods, for example, as a piece of property, would be to clear cut all of the redwood trees as fast as possible. Yet this is not the use men of wisdom have put it to.

Moreover, the *Olson* case does not state that the short term most profitable use is to be equated with highest and best use; it merely states that highest and most profitable use is to be considered in determining value. It is but one factor, such as demand, limitations of law, and other incidents which go into the determination of fair market value. It is to be observed that Judge Goodman was careful to include the full quotation which

included the limitation concerning the use of the term "highest and most profitable use."

Thus, in law there is no justification for equating "highest and best use" with short term "highest and most profitable use" as the sole means of determining market value. Yet this was done in this case. Vol. 5, Nichols, *Eminent Domain*, p. 245:

"All factors which would be considered by a reasonable purchaser and seller in fixing the value should be considered by the witness in reaching his opinion. An opinion based exclusively upon one factor should be rejected."

#### **Fair Market Value May Not Be Founded Upon Only One Kind of Mythical Prospective Purchaser of the Property**

Under the law, the determination of fair market value by an expert appraiser is to place himself in the position of a willing and informed buyer who is under no compulsion to buy and determine what he would pay for the property both before and after the taking (Howell, R 1293; Linville, R 1379). There is no disagreement that this is a proper approach to the determination of fair market value.

The testimony here unmistakably establishes that a prospective buyer for this property could be either of two kinds (Stathem, R 1192; Linville, R 1465), first, the buyer who owned *no* timber land, or second, the buyer who owned other timber land. It is apparent that the market value of Sec. 31 to each of these potential purchasers is quite different (Howell, R 1395; Linville, R 1465, 1455) and that the differences are most important. Stathem testified that even the methods of appraisal are different (R 1191-2), in the first instance it is appraised as timber and in the second as timber land.

The value of Sec. 31 to the first type of buyer who owns no other timber land would obviously be only in the value of the timber itself (Howell, R 1359, 1379). Not owning any other timber land he could not practice conservation of the timber resource

nor operate the section on a land management program. The Government witnesses all agree as to this fact (Stathem, R 1192; Howell, R 1359, 1379; Linville, R 1465). He would also regard the stumpland after the section had been cut over as a liability (Linville, R 1465) and he would discount this as much as possible in establishing the amount he would be willing to pay. He would obviously be interested in the immediate harvest of all timber on a "cut out and get out" basis (Howell, R 1366) and he would have no reason or even a desire to conserve the timber as a natural resource on a continuous yield basis (Stathem, R 1192; Linville, R 1466).

It is only this second type of buyer who owns other timber land who can practice timber management and who is interested in the future and who must do as the Forest Service does, i.e., preserve this natural timber resource and harvest it on a management basis for a continuous yield. To him the land and the timber of Sec. 31 will make it possible to do this on a more extended and reasonable basis, and so the over-all value includes not only the timber but the land, and the over-all value is completely and entirely different for him. Stathem readily admitted that the owner of timber land could not operate on a "cut out and get out" basis (Stathem, R 1192). An immediate harvest would require large and different kinds of equipment (Linville, R 1438). Yet this fact was not even put to the jury under the Trial Court's views. Scott found itself tried by the Court with the jury's only province to decide which of the two Government witnesses to believe.

The Government valuation experts Howell and Linville based their values on one type of buyer only, i.e., the buyer who owns no other lands and his only interest is in the timber alone on a "cut out and get out" basis (Howell, R 1336; Linville, R 1437). To exclude one class of buyer from consideration of value either consciously or unconsciously results in an error of fact which

cannot but affect and alter and discredit the Government opinions as to value.

#### **The Government Valuation Experts Assumed Incorrect Facts Concerning Special Use Permits for Special Service Roads**

During the course of the trial the scope and validity of the Special Service Roads operated by the Forest Service became a major factor in the determination of the fair market value of Sec. 31 after the taking. There was no dispute that the improving of the old road system after the taking would make it become a Special Service Road (R 1202; Howell, R 1372) and that its use for logging would be subject to the strict control of the Forest Service under Special Use Permits (R 1156).

So far as Scott is concerned, or any similar purchaser, any road access for the timber management of Sec. 31 would thereafter have to be done pursuant to a permit, as distinguished from a matter of right. Neither Scott nor any purchaser could build another road system because of the difficulty and limitations of the terrain (R 21). After the taking, the logging of Sec. 31 must conform to the Special Use Permit by the Forest Service. This would be true no matter who the private purchaser might be. The Government's position was simply that a purchaser normally could log in the usual way without additional cost or interference by the Forest Service (Stathem, R 1162). There was also another disadvantage, which everyone conceded, namely, that the road would be open to the public (Cameron, R 1275; Howell, R 1374). Thus the danger to and conflicts with public use, the dangers involved in logging, resulting from lack of control of the road system, became a substantial factor of value.

It was Scott's testimony that the control of the road system was most important (R 21) and without such control the remaining property could never be sufficiently managed (R 29). The severe nature of the terrain on Sec. 31 made the use of the roads neces-

sary as landing and skidding areas (R 21) and under such conditions the presence of the public would make it extremely dangerous as well as subjecting Scott to extensive liability. In point of fact, the use of the road system by anyone else at the same time as logging occurred would be impossible (R 1224). Yet Scott no longer had this control with regard to its timber on the remainder of Sec. 31.

The Government admitted early in the trial that a prospective purchaser of Sec. 31 would be interested in determining "If I bought this property what would you [the Forest Service] allow me to do on this easement" (R 177). Mr. Stathem stated that in his opinion there would be no restrictions as to the owner's utilizing the road in the same manner as before, including the necessary landing and skidding areas (R 1162). He also stated that there would be no charge for the use of the road (R 1164). Later however, he altered his testimony to say that there would be a maintenance charge (R 1164). There were further requirements before a user could even obtain a Special Use Permit. First, it must first qualify as a commercial user (R 1203). Next it must post a bond so that if it does not have the money or is not able to perform the maintenance, the Government will have the money to do it for it (R 1165). It must be presumed that the Government policy is not, nor is Mr. Stathem's opinion, binding forever. The risk as to the future is clearly apparent.

The Government witnesses simply assumed that by placing a few signs [two] at intersections of the Special Service Roads that control would result. It was Mr. Stathem's testimony that he could personally restrict the road's usage (R 1157, 1204; Howell R 1369; Cameron, R 1272; Linville R 1433). Mr. Stathem nevertheless, testified that the permit, the Special Use Permit, spells out the requirements of use (R 1203).

A typical Special Use Permit issued by the Forest Service by Mr. Stathem dated June 5, 1959, (or within a year prior to the

taking), was put in evidence as Exhibit 3. This was offered by the Government as being a typical example (R 237, 240), and Mr. Stathem testified that the basic concept of Special Use Permits did not change (R 1205-6). It repudiated the concept that Scott could evermore use the condemned road for logging as it wished. For it stated at Section 15: (R 1206)

"This permit may be terminated upon breach of any of the conditions herein, or at the discretion of the Regional Forester or the Chief, Forest Service."

Nowhere in Exhibit 3 is there any authorization for a commercial user to put up signs limiting the use of the road, and there is no obligation upon the Forest Service to do so, and no way of requiring it to do so. Mr. Stathem's testimony was designed purely to limit damages and ignored the admitted Special Use Permits required to be used. Yet, the Trial Court did not comment upon this contradiction, or indicate its speciousness.

Moreover, the Government valuation expert (Howell, R 1376) ignored Paragraph 31 of the regulations defining the use of the Special Use Permits. It provides:

"After construction operations have been completed this road shall be open at all times to the free use of the public."

This printed provision of the Special Use Permits completely disposed of the "expert" testimony of the Government and substantially supported Scott's experts. Obviously, if the road is kept "open at all times to the free use of the public", the commercial user cannot close it for his private reasons.

No reasonable prospective purchaser would fail to take into consideration the effect of the clear warnings provided in Special Use Permits. These would not only affect its commercial operations but even its rights to remove the timber on his own land could be subject to arbitrary cancellation at the discretion of the Forest Service. Yet the language was ignored by the Government's

valuation experts. Again the Trial Court undertook no comments on this portion of the case where the Government's witnesses ignored pertinent facts, nor was their testimony stricken because they had failed to take into account these obvious facts.

### **THE TIMING OF THE STRIKING OF DEFENDANT'S VALUATION TESTIMONY AND THE INSTRUCTIONS BROUGHT ABOUT AN UNEXPLAINED DIVERGENCE AND THIS IS ERROR**

As has been demonstrated earlier herein (*supra*, p. 20) in commenting on the evidence the Trial Judge referred only to the testimony of Defendant's valuation experts (R 1662-1668). This was done with finality and ictus and the Court concluded: (R 1668)

"So that is the status of the testimony and the evidence as I now rule on it."

These rather extended remarks were so inflammatory and so prejudicial that counsel for Defendant immediately objected: (R 1669)

"Your Honor, I would like you to advise the jury that I do not concur in your rulings; that I have objected to them; and that I consider them highly prejudicial to my case."

At this point the jury could not have avoided the feeling that all of the Defendant's witnesses were subject to this castigation and that it should view the remaining testimony, if any, with suspicion. This was further enhanced and fed by the Trial Court's later instruction: (R 1681)

"This means that in order to find just compensation here equal to the evidence submitted to you by the Defendant or the witnesses for the Defendant this evidence must have greater weight in your estimation and more effect than that submitted to you by Plaintiff and its witnesses."

The sum and substance of this situation was to compel the jury to disregard all of the testimony not only of Wall and Sanders, but the remainder of Defendant's witnesses, or to cast such suspicion that the testimony could not attain the degree of believableness which would sustain Defendant's burden. While the Court made it very plain in the instructions that only the valuation testimony was to be ignored, that was the only issue left in the case. The right of the taking had been decided. Further, the testimony of other witnesses for Scott was designed to support the valuation experts not to supplant it. Indeed, the timing of denouncement just before the instructions, and the generality of the instructions inevitably would lead any jury to believe it must disregard all of Scott's testimony. This is precisely what the jury did—in a matter of a very short time.

Where the Court submits the evidence and the theory of one party prominently, it is reversible error to fail to accord the position of the other side in equal prominence. *State Automobile Mutual Ins. Co. of Columbus v. York*, 104 F.2d 730, cert. den. 308 U.S. 591, 87 L.Ed. 495 (CCA NC, 1939); *Home Ins. Co. N.Y. v. Consolidated Bus Lines*, 179 F.2d 768 (CCA W.Va., 1950); *Pullman v. Hall*, 46 F.2d 399 (CCA W.Va., 1931).

**IT WAS ERROR FOR THE TRIAL COURT NOT TO INSTRUCT THE JURY WITH RESPECT TO CRITICAL ISSUES, THE FAILURE OF WHICH WAS BOUND TO RESULT IN A MISCARRIAGE OF JUSTICE**

The Court erred in failing to instruct the jury with respect to critical issues in this case, the failure of which was bound to result in a miscarriage of justice. These critical points are as follows:

- (a) That Sec. 31 was owned in fee by the Defendant, Scott Lumber Company, at the time of the taking.
- (b) That in the determination of value, the prospective purchaser could be other than the "cut out and get out" timber buyer not interested in owning land or timber land.

(c) That the Government's valuation experts did not take into account one of two types of prospective purchasers and based their valuation figures only on depletion cutting.

(d) That the highest and best use of Sec. 31 was for the production and management of timber which could not be accomplished by depletion cutting.

(e) That the Government witnesses were not qualified to express any opinions as to the most profitable use of Sec. 31, and that figures based upon the most profitable use are valueless.

(f) That the loss of a controlled road, replaced by a Special Service Road where the public cannot be excluded, is an element of damage for which Defendant should be compensated.

Appellant makes no claim nor pretense here that instructions involving any of the above points were submitted to the Trial Court at any time. It does point out that in the final analysis it is the Trial Court which determines what instructions are to be given and how. If proper instructions are not given then the jury cannot render an accurate or fair verdict. It may be true that the failure to give a specific instruction is not a matter which can be raised on appeal. However, such omissions were proper on the consideration of the Motion for New Trial and the insufficiency of the Trial Court in not giving correct instructions was bound to result, as it did, in a miscarriage of justice and the failure to grant Appellant just compensation. The failure to grant a New Trial is a proper issue for appeal.

### **CONCLUSION**

In any condemnation case it is most obviously a proceeding of the Government, by the Government and for the Government. Particularly in this case, the overwhelming force and power of the Federal Government was directed against a single member of

the public, Appellant, Scott Lumber Company. The courts have a particular duty in the protection of citizens, to see that the power of condemnation is properly exercised, and that just compensation is made pursuant to a fair and impartial trial.

From the very outset of this case one receives the strident attitude that the Government need not justify the taking of private land, and that adequate compensation is whatever the Government feels should be paid, supported by the testimony of experts hired for this purpose. The patronizing attitude of the Government in this case was indeed shocking. Its Motion to Determine a Preliminary Legal Question was converted to Summary Judgment at its request after a favorable decision on the Motion. This in spite of the situation that there was a very marked dispute on the facts and the propriety of the taking, which should have been left for the trial. Summary Judgment under the circumstances was wholly improper.

The same dominance was encountered at every stage during the trial on the only question allowed to go to the jury, that question of just compensation. The Trial Court completely ignored the stipulation of the parties set forth in the Pre-Trial Order without in any way protecting the rights of Appellant, Scott. Nor can it be convincingly stated that the disregard of the Pre-Trial Order was inadvertence. The conflicts with the Pre-Trial Order were pointed out by Scott in its Motion for New Trial. In the denial of this Motion, the Trial Court adhered to its repudiations of the stipulations of the Pre-Trial Order. Furthermore, it used these variances to strike down Appellant Scott's valuation testimony at a time when all of the testimony was in and each party had rested, so that it was impossible for Appellant Scott to be protected in any way. In addition, throughout this Brief it has been pointed out how the Trial Court applied one set of standards to Appellant's valuation witnesses and a different set of standards for the Government's valuation witnesses, leaving Appellant Scott

without any valuation testimony whatever and leaving the jury only the choice as to which Government expert to believe. The errors were so many and so devastating to Scott that a proper determination of just compensation was rendered impossible. Accordingly, this case should be reversed and remanded for a new trial.

Respectfully submitted,

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I certify that in connection with the preparation of this brief,  
~~and 39~~  
I have examined Rules 18 and 19<sup>1</sup> of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HENRY GIFFORD HARDY

**(Appendix Follows)**





## *Appendix A*

### **DEFENDANT-APPELLANT'S EXHIBITS**

#### **In Re: Scott Lumber Company, Inc. v. United States**

##### **Volume 1**

Exhibit	Identified	In Evidence	Description
A		15	United States Department of Agriculture, Forest Service Map Shasta National Forest (southern half) California Mt. Diablo Meridian 1954.

##### **Volume 2**

B	103	108	Photograph of Sec. 31 taken 9-6-1961.
C	111	117	Photograph taken 11-9-1961 on the southern road identified as Parcel 3 in the Government taking at the western boundary Sec. 31.
D	112	119	Photograph of the southern entrance to Parcel 3 taken 11-19-1961.
E	112	122	Photograph of the eastern entrance to Scott property on Parcel 2 taken 11-10-1961.
F	112	123	Photograph taken 11-8-1961 of the eastern entrance to Parcel 1.
G	132	132	Logging plan map prior to May 18, 1960.

##### **Volume 3**

H	243	Withdrawn	Letter dated 11-20-1964 from Southern Pacific
		265	Land Company to Mr. Toler.
I	304	304	Sanders Sales Map.
J	314	314	Large Sales Map.

##### **Volume 4**

K	381		Timber Sales Charts.
L	444		Factor Chart.
M	580	Withdrawn	Letter to Mr. Berry dated 6-5-1962 from W. H.
		648	Thomas Associates.
N	625	625	Photograph of bank.
O	626	626	Photograph of the bank taken 11-5-1964.
P	628	628	Photograph of a leaning tree taken 11-10-1961.
Q	632	632	Photograph of the road before taking.
R	633	633	Photograph after taking of the road substantially as it will be when the Government finishes its construction, taken 11-5-1964.

Exhibit	Identified	In Evidence	Description
S	637	637	Photograph of the former landing area before the taking.
T	643	644	Photograph of the culvert hole.
U	645	645	Document showing the condition of the road before the taking.
<b>Volume 6</b>			
V	649	654	Photograph of the old road Parcel 2, taken 11-10-1961.
W	654	658	Photograph of landing number 19B, Parcel 2 of the new road, taken 11-5-1964.
X	658	658	Photograph of the old road, Parcel Number 3 taken 11-9-1961.
Y	689		Pictures and report file of Sec. 31 of George W. Berdan.
Y-1	} Photographs of Exhibit Y each numbered separately. These are referred to in Volume 9. Photographs taken 11-28-1964. Identified and In Evidence as follows:	1083	1086
Y-2			
Y-3			
Y-4			
<b>Volume 7</b>			
Z	769		Timber Sales Map of Myron Wall.
AA	791		Report dated 11-25-1964 addressed to Mr. William H. King from James W. Prochnau.
BB	859		Report dated 11-23-1964 to Scott Lumber Company (I. E. Toler) from Mr. Jack Brewen.
<b>Volume 8</b>			
CC	864		Report to Scott Lumber Company from George Berdan (undated).

### **PLAINTIFF-APPELLEE'S EXHIBITS**

#### **In Re: Scott Lumber Company, Inc. v. United States**

<b>Volume 1</b>			
1	72	76	Deed from Watt and Lamm to Scott Lumber Company.
2	75	76	Deed from Southern Pacific Land Company to Deschutes Lumber Company.
<b>Volume 2</b>			
3	237	240	Forest Service Special Use Permits dated June 5, 1959 and September 20, 1955, with amendments, to Scott Lumber Company.

**Volume 6**

Exhibit	Identified	In Evidence	Description
4	717	719	State of California Fire Protection Map by Agencies—as revised 1963.

**Volume 9**

5		1132	Map of the Shasta-Trinity National Forests Area.
6		1144	Map of portion of Big Bend Working Circle.

**Volume 10**

7	1158	1159	Photograph of sign.
7-A	1158	1159	Photograph of truck.
8	1170	1171	Photograph of portion of Sec. 31 taken in November of 1959.
8-A	1170	1171	Photograph of portion of Sec. 31 taken in November of 1959.
9	1176	1177	Fire Causation Chart.
10	1262	1263	Mr. Howell's Sales Market Map.

**Volume 11**

11	1414	1415	Linville Sales Map.
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TOWNSHIP 37N RANGE 2E, Section 31 LOGGING MAP OF SCOTT LUMBER COMPANY, Inc. PROPERTY

~~~~ Ridge  
)( Saddle or Pass on Ridge  
♂ Knob  
— Draw  
--- Spring

— Existing Road Along Condemned Strip  
— Spur Logging Roads  
~~~~ Fire Lane and Land Management Roads  
④ Landing Site and Landing Numbers  
□ Proposed Landing Site Never Constructed

— Skidding Boundary and Land Area  
→ Log Skidding Direction  
◆ G L O Section Corner Found  
■ G L O Quarter Section Corner Found  
— U. S. Forest Service Road R. W Easement

— Spur to be Constructed  
◎ New and Rebuilt Landing Locations  
— Solid Roads to be Constructed  
— Dashed Skidding Boundary  
Yellow Danger Tree Strip





